

NO. 56318-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW RUTH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable David F. Hulbert, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor violated appellant's constitutional right to confrontation by impeaching him with an alleged inconsistent statement that he was unprepared to present.

2. Appellant was denied his constitutional right to a fair trial where the prosecutor improperly offered an opinion as to appellant's credibility and guilt, and where the prosecutor misstated the law as to self-defense.

3. Appellant was denied his constitutional right to remain silent when the prosecutor attempted to "impeach" him with his prearrest silence during cross examination and closing argument.

4. Appellant was denied his constitutional right to effective representation and a fair trial when his trial attorney requested language used in instruction 16, which misstates the law and eased the State's burden to disprove appellant's self-defense claims.¹

5. Cumulative error deprived appellant of his right to a fair trial.

6. The trial court violated appellant's constitutional right to a jury trial by imposing 60-month "firearm" enhancements because in their

¹ Instruction 16, CP 72, is attached to this brief as appendix A.

special verdicts, jurors found only that Ruth was armed with a “deadly weapon.”

Issues Pertaining to Assignments of Error

1. The prosecutor cross-examined appellant about an alleged inconsistent statement he made to a friend, then failed to produce the friend to impeach appellant, then used the alleged inconsistent statement in closing argument. Did the prosecutor violate appellant’s right to confront adverse witnesses by improperly insinuating appellant made the inconsistent statement?

2. During closing argument, the prosecutor offered an opinion on appellant’s credibility and guilt when he stated he would “not pay attention” to a portion of appellant’s testimony. On rebuttal, the prosecutor misstated the law on self-defense and thereby mislead the jury when he argued, in direct contradiction to the “no duty to retreat instruction,” that “If [appellant] is so threatened, all he has to do is leave. Call the cops.” Did the trial court violate appellant’s right to a fair trial by denying his motion for mistrial based on this misconduct?

3. The prosecutor asked appellant why he did not call police when he learned of the victims’ involvement in drugs. On rebuttal, the

prosecutor told jurors that all appellant had to do was call the police. Did the prosecutor's actions violate appellant's right to remain silent?

4. At trial, appellant's attorney requested a jury instruction that eased the State's burden to prove that he did not act in lawful self-defense. In 1998, the Washington Supreme Court specifically disapproved of the language used in this instruction, and this Court has reiterated that disapproval since. Was appellant denied his right to effective representation and a fair trial?

5. Did the cumulative effect of the errors listed in issues (1) through (4) above deprive appellant of his right to a fair trial?

6. For sentence enhancement purposes, the jury found appellant was armed with a deadly weapon during the offenses. Despite this finding, the trial court imposed a firearms enhancement. Did the trial court's decision violate appellant's right to a jury trial?

B. STATEMENT OF THE CASE

1. Procedural History

The state charged appellant Matthew R. Ruth with two counts of first degree assault with a firearm, and with being armed with a firearm at the time of the offenses. CP 85-86. A jury found Ruth guilty as charged. CP 50, 52. The jury also found that Ruth was armed with a "deadly

weapon” at the time of the offenses. CP 49, 51. The trial court sentenced Ruth to consecutive 105-month standard range sentences, then added consecutive 60-month “firearm enhancements” to each conviction, making for a 330-month term of confinement. CP 32-35; RP3² 25-26.

2. Substantive Facts³

a. State’s Case

Jeremy Custer lived in a small one-bedroom home. RP1 118-19. He was in the music business and had met Ruth one time at a friend’s house several years before the crime. RP1 119-20. About three months before the offense, Ruth moved into a travel trailer parked near Custer’s home, followed shortly thereafter by his girlfriend, Renee Woerner. RP1 120-22. While they were neighbors, they socialized and Custer said he had no problems with Ruth. RP1 122.

On the day of the crime, Custer arrived home at about 1 p.m. RP1 122. His friends Drew Eden and Dan Gist were there, along with Ruth and

² Eight transcripts have been made part of the appellate record. The first five reported pretrial proceedings that will not be referred to in this brief. The final three transcripts, however, are pertinent to the brief and will be referred to throughout as follows: “RP1” (Volume I, pp 1-181, pretrial and trial proceedings); “RP2” (Volume 2, pp. 181-321, trial proceedings); and “RP3” (2/4/2005 Sentencing Hearing).

³ Additional facts that are relevant to a particular argument are included in the Argument section of the brief.

Woerner. RP1 122-23. Custer noticed that headphones he used for business were missing, and when he could not find them in his house, he asked Ruth if he could look in the trailer because Ruth had sometimes borrowed his things.

RP1 124. Custer had also noticed other things missing, such as CDs and “a little bit of” marijuana. RP1 125. However, on that day he entered Ruth’s trailer only in search of headphones. RP1 148-49.

Ruth gave Custer permission to look in the trailer. RP 125. Woerner entered the trailer first, followed by Custer and Ruth. RP1 126. Woerner sat on the bed and Custer did the same, while Ruth remained closer to the door. RP1 126-27. As Custer began to look for items, Ruth became agitated and said Custer was being disrespectful. RP1 127-28. Custer attempted to calm Ruth down to no avail. Custer had never owned a gun, was not armed, and had nothing in his hands. RP1 127-28, 135.

Ruth pulled a gun out of a closet and continued making comments about being disrespected and wrongly accused. RP1 129-30. At some point Eden also entered the trailer and stood nearer to Ruth. RP1 129. Ruth never told Custer to leave. RP1 131. Ruth suddenly fired a shot, hitting Custer’s arm. Custer told Ruth he had just shot him, but Ruth then aimed lower and shot Custer on the leg. RP1 131-32. At that time Custer said, “You’re trying to kill me,” and Ruth responded by “kind of” smiling. RP1 132. Custer got

the impression from this response that Ruth was trying to kill him. RP1 133.

Ruth then fired a third time, grazing Custer on his side, at which point Custer started scrambling for a window. RP1 133. Ruth fired again and it looked like he was aiming for Custer's head. RP1 133.

Ruth yelled for Woerner to get out of the trailer and as she ran out, Eden followed behind. RP1 133. Ruth turned and shot Eden in the back as Eden was halfway out the door. RP1 133-34. Ruth followed Eden out of the trailer, at which point Custer escaped as well. RP1 135. Ruth then ran off. RP1 135.

Custer went back to his residence and collected up his most expensive musical equipment, then drove to a friend's house. RP1 135-36. After a time he returned to his residence with a friend and by then, the police had arrived. RP1 136-37, 151. He initially said, "No cops." RP1 137. He told police he wanted to speak with an attorney before giving a statement. RP1 146-47, 150. Police told him he had to go to the hospital, but he instead started walking toward his friend. At that point, a police officer warned him, handcuffed him, and took him to the hospital. RP1 93, 137-38, 145, 147, 150-52.

Drew Eden testified he came to Custer's residence on the day of the shooting because "[i]t had been speculated" and "there was the rumor" that

Custer had a pound of marijuana. RP1 167, 172-73. After he arrived, Custer asked Ruth if he could look in his trailer for missing headphones and other small items. RP1 156-57. Ruth gave Custer permission to look inside the trailer. RP1 157. Eden remained inside Custer's residence as Custer and Ruth entered the trailer. RP1 158.

He then heard Ruth shouting things like, "This is not right, You're acting like the cops[.]" RP1 158. Eden admitted it was possible he could have told a defense investigator that Ruth said something like, "Get the hell out of my trailer[.]" RP1 174. He said the shouting sounded "confrontational" so he went to the trailer thinking he was going to try to break up a fight between Custer and Ruth. RP1 173. He went inside and saw Woerner, Custer and Ruth. RP1 159. Eden was not armed and had nothing in his hands and neither he nor Custer threatened Ruth. RP1 160-61. Woerner was on the bed and Custer was sitting in a main entryway. RP1 160. Ruth stood in the entryway facing Custer. RP1 160. Both he and Custer were calm when Eden walked in. RP1 160.

Suddenly Ruth pulled out a gun and began shooting Custer. RP1 162-63. He was aiming from the chest up and fired several times. RP1 163. He heard Custer tell Ruth that Ruth was killing him. RP1 163-64. Ruth

yelled for Woerner to leave and when she did, he followed. RP1 164. As he fell out of the trailer, Custer shot him in the back. RP1 164-65.

He ran down the street, jumped into a stranger's car, and was taken to a hospital. RP1 113-14, 165. During the ride, the driver recalled that Eden said he had been shot "over a pound of weed," and that "he was going to kill the guy that shot him." RP1 116-17.

Police came to the hospital to speak with him, but he said he did not want to give a statement. RP1 104, 166-67. He nevertheless offered a rough rendition of events, during which time he said he did not know what Custer and Ruth had been arguing about. RP1 103, 111-12.

Police investigated the scene, including the trailer and surrounding area. RP1 57-101. They took photographs of a comforter that had what appeared to be blood stains on them. RP1 74. The stains were never analyzed and were not scientifically identified as blood. RP1 94. A suspected bullet hole appeared above the headboard of the bed. RP1 75. Officers found an expired driver's license in Custer's name and an identification card in Custer's name in one of the drawers. RP1 76-77. They also found a .22 caliber gun concealed in a shed. RP1 83-88. No marijuana was found inside the trailer. RP1 101-102.

After he was arrested, Ruth spent time in jail with experienced jail informant Jeremiah Sheridan. RP2 183, 190. Sheridan had informed on several other defendants and on one occasion the state reduced one of his charges. RP2 190-91. He had six or seven convictions for property crimes and described himself as “a dooper and a thief.” RP2 185.

Sheridan testified that Ruth approached him and spoke about his case. RP2 183. He believed Ruth had mental health problems, that “he wasn’t all there.” RP2 188-89. Sheridan surmised that Ruth came to him because his family was known around the county for being “banditos” and for hurting people. RP2 184-85. Ruth told him he had shot two people and wanted to have someone urge Custer and Eden to change their statements before they went to court, and then to “disappear” after that. RP2 184-85.

Over time the two had numerous conversations and at one point Sheridan saw Ruth write a statement explaining how to contact witnesses and how he wanted things to be accomplished. RP2 186. Sheridan contacted a sheriff’s detective and he eventually met with another officer. RP2 186-87. Sheridan testified that he asked for no favors from the officer or from the state. RP2 187.

b. Defense Case

Ruth was the sole witness for the defense. He said he met Custer through the music business and went to Custer's residence about two months before the shootings because Custer told him he had a record label. RP2 220-22. Custer had a small music studio in his residence. RP2 225. When Ruth arrived he saw many people using drugs. RP2 227-28. At some point Ruth got involved with Custer and began making music for him. RP2 228-29. He moved into the trailer because Custer said he would make more money working for him. RP2 230. When he first moved in Custer had drug paraphernalia and trash everywhere because Custer and a friend had previously lived there. RP2 231. He also found Custer's property in the drawers, one of which was a name tag. RP2 232-33.

After working with Custer for a couple of weeks, he began to learn what Custer and his friends were up to. RP2 233. He began noticing large quantities of drugs, "[p]ounds and pounds and pounds of different drugs." RP2 233-34. He said Custer's music activity was a front and that he was really laundering money and drugs. RP2 234. While working on music at Custer's home, he heard Custer and his group discussing how they robbed drug dealers, how one of their friends was killed, and how they were going to

kill the persons responsible. RP2 235. The group wore guns at all times and said they had killed people and buried them underneath farms. RP2 235.

During this time, Ruth noticed that when he went out to work on a music job, Custer's friends would "hunt [him] down." RP2 235. They called his friends, found out his whereabouts, and told them Ruth had music business to attend to at Custer's studio. RP2 235. He was "beginning to get really, really, really intimidated by these guys." RP2 235.

Five days before the shootings, he was awakened by tires screeching. RP2 237. Four or five cars rapidly pulled up to Custer's residence. RP1 237. A confrontation ensued between about 15 people. Custer and Eden were part of this group. RP2 238. They pulled out guns and so did many of the other people. RP2 238. Although Ruth expected a shoot-out, no guns were fired. RP2 238.

On the night before the shootings, Custer came over and said he was leaving for the night and wanted Ruth to watch his drugs. RP2 239. Not wanting to get involved with guns and drugs, he refused. RP2 239. He told his landlord about Custer's drug activities. RP2 240.

On the day of the shootings, Ruth saw Custer, Eden and several others outside Custer's residence. RP2 240-41. Custer looked very high and agitated. Eden gave Ruth "dagger looks" and he thought "the chemistry was

a little weird.” RP2 241. Custer began screaming and yelling that he and Woerner had “snitched” on him and that he was getting kicked out of his residence. RP2 242. Custer also accused him of stealing his drugs. RP2 242. He said he knew the drugs were inside his trailer and that he was going to go inside and anally rape Woerner while Ruth and Eden watched. RP2 242. Custer said that after he raped Woerner, he was going to kill her and Ruth and bury them on a farm. RP2 242. Eden made the same type comments. RP2 242-43. Custer and Eden appeared serious and Ruth was extremely frightened and “freaked out.” RP2 242.

Ruth tried to calm them down, told them he did not steal anything or tell the police anything, and that if they went inside the trailer he would call the police. RP2 243. Custer responded that if he did that he would kill Ruth’s father and Woerner’s children. RP2 243. Ruth believed him. RP2 243. At that point all three ran for the trailer and struggled at the door. RP2 244. Woerner was inside and there was no way for her to escape. RP2 244.

Ruth arrived first and was able to retrieve his gun just before Custer and Eden entered the trailer. RP2 245-46. Ruth thought he was going to die. RP2 245. Custer and Eden pulled out their guns. RP2 245, 274-75. Ruth backed up and Custer approached him, while Eden went up some stairs to where Woerner was. RP2 246. As Custer went for his gun, Ruth began

shooting. RP 246. He did not want to hurt anyone; he simply wanted them to leave. RP2 246. He tried to keep his shots low and at the time had no idea he had shot either Custer or Eden. RP2 246. Custer and Eden ran out the door. RP2 246-47. They screamed that they were going to get their friends and come back and that he would be dead if he did not leave. RP2 247-48.

Ruth saw Custer and Eden go into Custer's home and come out carrying two plastic bags and many guns. As they put the items into Custer's truck he and Eden began to argue. RP2 248. Eden screamed and said he was not going to get caught "with any of this crap, I'm not going with you." RP2 248-49. Eden then ran away, as did Custer. RP2 249. Ruth and Woerner went to their landlord's house and hid behind a barn. RP2 249. One of Custer's friends, Dan Gist, appeared and told them they had better hurry up and leave the state because Custer and Eden would be looking for them. RP2 249.

Ruth threw his gun behind a barrel at the barn and told Gist to tell Custer that he would not call the police. RP2 249. They waited for their landlord and asked her for a ride. RP2 250. Ruth gathered his things from the trailer and his landlord drove him to his friend's house. RP2 251. The next day he and Woerner left for California and stayed there for two weeks with his mother. RP2 251. At that point, he turned himself in to a local

detective. RP2 251-52. While in a California jail waiting for transport, he was given anti-anxiety medication that made him “delusional.” RP2 254.

After he was booked into Snohomish County Jail, he was given the same drug. RP2 251-54. After he complained, he was given another drug that made him “oblivious to [his] surroundings.” RP2 255. He was housed in the same area as informant Sheridan, and his cellmate was one of Sheridan’s friends. RP2 252, 255. Sheridan told him he knew everything about crimes and his case and that he was going to help him. RP2 253. At one point Ruth and his cellmate were reviewing his discovery packet because he was not able to read and comprehend the information. RP2 256. He said everyone around him thought he had mental problems. RP2 256.

Sheridan looked at Ruth’s discovery and said he knew Custer. RP2 256. Sheridan told him Custer and Eden felt bad that he was in jail and wanted to help him out. RP2 256-57. Ruth believed Sheridan. RP2 256-57. He and other inmates told him Custer and Eden were willing to change their testimony. RP2 257. Sheridan and other inmates, who intimidated Ruth, told him what to write in his notes. RP2 258, 271-72. He ended up writing two different stories that they instructed him to write. RP2 258-59. He followed directions because Sheridan told him the notes would get him out of jail. RP2 259. And because he was heavily medicated, he followed their advice.

RP2 259. Sheridan told him if witnesses changed their stories the state would drop the charges. RP2 260. Ruth did not tell Sheridan he wanted Custer and Eden killed. RP2 260.

c. Self-Defense Instructions

Ruth's defense at trial was self-defense and defense of others -- that he used justifiable force in light of a reasonable fear that Custer and Eden were about to kill him and Woerner.

Instruction 17 correctly set forth the applicable standard for both counts 1 and 2, first degree assault:

It is a defense to a charge of Assault in the First Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person or a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 73 (emphasis added).

Unfortunately, in contrast to the fear of “injury” in instruction 17, instruction 16 provided:

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 72 (emphasis added).

Defense counsel proposed an instruction with the same “great bodily harm” language found in court’s instruction 16. CP 83; 2RP 284.

d. Weapons Enhancement Instructions

Ruth was charged with two counts of first degree assault with “a .22 caliber handgun” in pertinent part as follows: “[A]t the time of the commission of the crime, the defendant . . . was armed with a firearm, as provided and defined in RCW 9.94A.510, RCW 9.41.010, and RCW 9.94A.602.” CP 85.⁴

⁴ RCW 9.94A.510, the former firearms sentencing enhancement provision, has been recodified as RCW 9.94A.533. For simplicity, the current version of the firearm enhancement statute will be used in this brief.

The “to-convict” instructions required the jury to find that Ruth committed the assaults “with a firearm.” Instructions 11, 13; CP 67, 69.

Jurors were also instructed that:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of [the crimes].

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Instructions 12, 14; CP 68, 70; RCW 9.41.010(1).

Finally, the court defined a “deadly weapon” as including “any firearm, whether loaded or not.” Instruction 10; CP 66.

However, on the special verdict form, jurors were not asked to find whether Ruth was armed with a firearm when he committed the offenses. Instead the special verdict forms read in pertinent part as follows: “Was the defendant Matthew Robert Ruth armed with a deadly weapon at the time of the commission of [crimes].” CP 49, 51 (emphasis added). Defense counsel neither proposed nor objected to the special verdict form. RP2 284-85. Interestingly, the state proposed the very forms that the court submitted to the jury. Supp CP __ (sub. no. 81, Plaintiff’s Proposed Jury Instructions, filed 12/6/2004) at pp. 21-22.

e. Sentencing Hearing

At sentencing, defense counsel pointed out that the special verdict form asked the jury to find whether Ruth committed the crimes with a deadly weapon, not a firearm. RP3 7. Counsel argued that under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), because the jury was discharged, the court was prohibited from using any sentencing enhancement at all and was restricted to sentencing Ruth within the standard sentencing range for first degree assault. RP3 9.

The prosecutor disagreed, pointing out that in instructions 12 and 14, jurors were informed that the special verdict finding applied to a firearm and not a deadly weapon. RP3 9-10. He also maintained that all evidence at trial showed that Ruth used a .22 caliber handgun during the offenses. He called the discrepant language in the special verdict forms “a technical deficiency.” RP3 10. The trial court denied the defense motion, reasoning that the jury was well-informed and unanimous in their understanding of what the special verdict called for. RP3 11.

Defense counsel then argued that because the court instructed the jury that a firearm was a “deadly weapon,” and that the jury found in the special verdict form only that Ruth was armed with a deadly weapon, the trial court was limited to applying deadly weapons enhancement terms of

24 months each. RP3 11. The prosecutor again disagreed. RP3 11-12. The trial court denied the motion. RP3 12-13. The court went on to apply the 60-month firearm enhancement to each count. CP 32-35; RP3 25-26.

C. ARGUMENT

1. THE PROSECUTOR VIOLATED RUTH'S CONSTITUTIONAL RIGHT TO CONFRONTATION BY IMPEACHING HIM WITH AN ALLEGED INCONSISTENT STATEMENT THAT HE WAS UNPREPARED TO PRESENT.

The Sixth Amendment to the United States Constitution and Washington Constitution article 1, § 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. State v. Price, 127 Wn. App. 193, 199, n.4, 110 P.3d 1171 (2005). In this case, the prosecutor asked Ruth whether he had told a friend “that you just freaked out, got weirded out, and shot [Eden and Custer]”? RP2 279. Ruth denied making the statement, and testified that he told his friend nothing about the case. The prosecutor did not call the friend during rebuttal. By asking the question knowing he could not perfect the impeachment, the prosecutor sought to – and did -- insinuate that Ruth indeed confessed to his friend. This improper tactic violated Ruth’s constitutional right to confront witnesses. See State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181

(1950)(“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.”)

Under Washington law, a witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court. ER 607; ER 613;⁵ State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987).

Proper impeachment requires that the cross-examiner first ask the witness whether he made the prior statement. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). If the witness acknowledges the prior statement, extrinsic evidence of the statement is forbidden because the impeachment is complete and such

⁵ Evidence Rule 613 provides:

(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

evidence would waste time and add little value. Babich, 68 Wn. App. at 443; 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 613.10 at 489 (4th ed.1999). If the witness denies the prior statement, extrinsic evidence of the statement is admissible unless it concerns a collateral matter. Babich, 68 Wn. App. at 443.

A jury may consider a prior inconsistent statement admitted under ER 613 only for purposes of evaluating that witness's credibility and not as substantive proof of the underlying facts. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). For that reason, "[a] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." Babich, 68 Wn. App. at 444 (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir.1984)).

In Babich, 68 Wn. App. at 441-42, the prosecutor attempted to impeach defense witnesses by referring to their prior inconsistent statements. But the State never followed up by introducing extrinsic evidence of those statements. If the trial court does not require the cross examiner to produce extrinsic evidence of the inconsistent statement, "cross-examination could be abused by making insinuations about statements that the witness did not in fact make, and the jury could be

misled into thinking that the statements allegedly attributable to the witness were evidence.’” Babich, 68 Wn. App. at 443-44 (quoting 5A K. Tegland, Wash. Prac., Evidence at 316 (3d Ed.1989)).

This is precisely what the prosecutor did in this case. His question to Ruth insinuated that Ruth had confessed to his friend, and was tantamount to testimony that could not be challenged. See 5A K. Tegland, Wash. Prac., Evidence § 613.15 at 65 (Supp. 4th Ed.1999, Pocket Part 2002)(“[I]f an attorney wants to convey facts to the jury, the attorney has to take the witness stand like any other witness—and face cross-examination and impeachment.”); State v. Lopez, 95 Wn. App. 842, 855, 980 P.2d 224 (1999).

The prosecutor compounded the error by using his “evidence” during rebuttal argument. The prosecutor contended that Ruth shot Eden and Custer because he was angry and knew that if Custer looked through the drawers in his trailer, he would find his property. RP2 310. “That made him mad. That made him paranoid. That freaked him out. That weirded him out. And he pulled out the pistol and shot him.” See Babich, 68 Wn. App. at 446 (noting that prosecutor improperly used insinuating cross examination during closing argument).

The state may nevertheless contend that Ruth waived any error by failing to object to the prosecutor's cross examination. Babich rejected this argument:

But in this situation, failure to object is not a waiver. It was not the questions themselves that were improper; it was the failure to prove the statements in rebuttal that was error. Until the State rested its rebuttal, Ms. Babich had no way of knowing whether the State would or would not prove the prior statements. By that time it was too late to undo the prejudice resulting from the prosecutor citing those prior statements in questions heard by the jury.

Babich, 68 Wn. App. at 446 (emphasis in original).

A prosecutor's improper impeachment by referring to extrinsic evidence never formally introduced as evidence may constitute a violation of the right to confrontation. Lopez, 95 Wn. App. at 855, citing Babich, 68 Wn. App. at 445-46. Such was the case here. Ruth could not cross-examine the prosecutor, and because his friend was not produced to support the prosecutor's insinuations, Ruth was deprived of his right to confront him as well.

A violation of the right to confront witnesses is constitutional error. State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011 (1997). Constitutional error is presumed prejudicial, and the state bears the burden of proving the error was harmless. McDaniel, 83 Wn. App. at 187. An error is not harmless

beyond a reasonable doubt where it is reasonably probable that the outcome of the trial would have been different had the error not occurred. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

Ruth's case boiled down to a credibility contest between Ruth and Eden and Custer. No other witnesses knew what happened in Ruth's trailer during the shooting. Ruth's defense was self-defense and defense of others. The prosecutor's back-door introduction of Ruth's alleged confession to his friend severely undermined that defense and was thus particularly prejudicial. As aptly stated by the Supreme Court long ago:

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to impartially seek justice], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Given the prestige of the prosecutor and the resulting prejudice, it is reasonably probable the jury would have believed Ruth's defense absent the improper insinuation. For these reasons the error was not harmless and Ruth's convictions should be reversed.

2. PROSECUTORIAL MISCONDUCT DURING CROSS EXAMINATION, CLOSING ARGUMENT AND REBUTTAL DEPRIVED RUTH OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

During closing argument, the prosecutor stated his personal opinion that Ruth's testimony should not be believed. He also misstated the law of self-defense and vouched for the credibility of Custer and Eden. This misconduct violated Ruth's constitutional right to a fair trial. His convictions should be reversed.

a. Standard of Review

The Sixth and Fourteenth amendments to the United States Constitution and Wash. Const. art. 1, § 22 guarantee a criminal defendant the right to a fair trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Statements by a prosecutor constitute reversible misconduct if the comments were improper and the defendant was prejudiced. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is shown where there is a substantial likelihood the prosecutor's remarks affected the outcome of trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was flagrant and ill intentioned. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 887 (1994), cert. denied, 514 U.S. 1129 (1995). Where the defendant objects or moves for mistrial on the basis of alleged prosecutorial misconduct, the appellate court reviews the trial court's rulings for abuse of discretion. State v. Borg, 145 Wn.2d 329, 334-36, 36 P.3d 546 (2001). A mistrial is proper where only a new trial can cure the prosecutor's misconduct and ensure a fair trial. State v. Henderson, 100 Wn. App. 794, 799, 998 P.2d 907 (2000).

b. Motion for Mistrial

During closing argument, the prosecutor stated, "I wouldn't pay any attention to it [Ruth's version of events] based on the testimony you have heard here." RP2 296. Further, despite a "no duty to retreat" instruction, the prosecutor argued that if Ruth felt threatened by Eden and Custer in the trailer, he could have left and called the police. RP2 311. Defense counsel objected to the latter statement, pointing out the "no duty to retreat" instruction. The trial court overruled the objection. The court also refused counsel's request for a limiting instruction. RP2 311-12. At the close of the prosecutor's rebuttal, counsel moved for a mistrial based on the prosecutor's

remarks. The trial court denied the motion without explanation. RP2 316-17.

The prosecutor's comments were improper because they constituted a personal opinion on Ruth's credibility and guilt and because they misstated the law of self-defense.

1. Opinion on Witness Credibility

Prosecutors are prohibited from stating their personal beliefs about the defendant's guilt or innocence or the credibility of witnesses. State v. Dhaliwal, 150 Wn.2d 559, 577-578, 79 P.3d 432 (2003); State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558 565 (1969), reversed on other grounds, 403 U.S. 947 (1971) (prosecutor may not throw prestige of his public office and expression of own opinion of guilt into trial; "any attempt to impress upon the jury the prosecuting attorney's personal belief in the defendant's guilt is unethical and prejudicial."). Whether expressed directly or through inference, an opinion on guilt is equally improper and equally inadmissible because it invades the province of the jury. See State v. Haga, 8 Wn. App. 481, 491-492, 507 P.2d 159, review denied, 82 Wn. 2d 1006 (1973)(witness may not offer opinion as to accused's guilt).

The prosecutor's remark here was an improper opinion that Ruth should not be believed and that hence, he was guilty. The state may counter,

however, that because the prosecutor's statement was qualified by the "based on the testimony you have heard here" language, there is no impropriety. This reasoning was specifically rejected by State v. Martin, 41 Wn. App. 133, 140, n.3, 703 P.2d 309, review denied, 104 Wn.2d 1016 (1985). In Martin, the court cited United States v. Bess, 593 F.2d 749, 754, which held the qualifying phrase "based on the evidence presented to you" did not diminish the prosecutor's erroneous vouching for the defendant's guilt.

Credibility determinations lie within the sole province of the fact finder. State v. O'Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005). The prosecutor improperly invaded that province here. Ruth's credibility was crucial to his defense of self-defense, especially because he was the only witness for the defense. Therefore, the prosecutor's remark was particularly prejudicial. See, State v. Jungers, 125 Wn. App. 895, 901-902, 106 P.3d 827 (2005)(prosecutor's comments disparaging defendant's credibility, in trial where credibility was central issue, required mistrial). The same result should obtain here.

2. Misstatement of the Law

On rebuttal, the prosecutor argued as follows:

[Ruth's] word is he saw them [Eden and Custer] armed. . . . [A]ccording to the defendant, he was afraid because they are always with guns and they murder people and they bury them in the pasture. . . . If you recall, the

defendant was standing right next to the door, looking into the bedroom, when he pulls out the pistol and starts to blast. The door is right there. If he is so threatened, all he has to do is leave. Call the cops.

RP2 311. Defense counsel objected and moved to strike, stating, “There is an instruction on that.” RP2 311. The court overruled the objection, finding, “It is argument. The jurors will make their own determination.” RP2 311. Defense counsel then asked for a limiting instruction, which the court denied. RP2 311.

The prosecutor’s argument flew in the face of the “no duty to retreat” instruction, instruction 15, which stated:

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 71. The prosecutor’s statement implies that the proper course of action for a frightened Ruth was to flee his own home. This argument misstates the law and misleads the jury on an important legal issue.

The prosecutor's statements to the jury about the law must be confined to the law as set forth in the court's instructions to the jury. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Appellate courts will reverse a conviction for improper argument of law where the error prejudices the accused. Estill, 80 Wn.2d at 200. Errors that could have affected the trial

outcome are prejudicial. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). And errors that deny a defendant a fair trial are per se prejudicial. Davenport, 100 Wn.2d at 762.

To determine whether the trial was fair, courts look to the error and determine whether it may have influenced the jury. That determination requires consideration whether the irregularity could have been cured by a jury instruction to disregard the remark. State v. Weber, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983).

Courts have been particularly vigilant when reviewing self-defense instructions. See State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201, (2004)(“[O]ur Supreme Court subjects self-defense instructions to more rigorous scrutiny.”). “Jury instructions must more than adequately convey the law of self-defense.” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). When read as a whole, the relevant legal test for self-defense must be readily apparent to the average juror. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

A defendant’s right to stand his ground and defend himself in his own home has been recognized in Washington for at least 70 years as an important component of self-defense. See State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936)(“We seem to be committed to the rule that one who is

where he has a lawful right to be is under no obligation to retreat when attacked.”). In Allery, the court held failure to give a “no duty to retreat” instruction when supported by the facts is error. Allery, 101 Wn.2d at 598.

Here the trial court gave a correct “no duty to retreat” instruction, but permitted the prosecutor to urge the jury to disregard it. The court exacerbated the error by overruling defense counsel’s timely objection and by denying counsel’s request for a limiting instruction. This allowed the jury to infer the prosecutor’s comments were permissible and could support their verdict. This “official imprimatur . . . placed upon the prosecution’s misstatements of law obviously amplified their potential prejudicial effect on the jury.” Mahorney v. Wallman, 917 F.2d 469, 473 (10th Cir. 1990) (finding prejudice where the court overruled defense counsel’s objections and failed to admonish the prosecutor).

Given the scrutiny courts have given to self-defense instructions, the prosecutor’s misconduct cannot be excused. There is a substantial probability the prosecutor’s actions affected the jury’s ability to properly apply the law of self-defense, and, as a result, their verdicts. Under the circumstances, only a new trial can cure the prejudice resulting from the misconduct. The trial court thus abused its discretion in denying Ruth’s

motion for mistrial. This court should reverse his convictions and remand for a new trial.

c. Other instances of misconduct

Just as it is improper to personally vouch against the credibility of a witness, it is equally improper for a prosecutor to personally vouch for a witness's credibility. State v. Horton, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Although not included as a reason for Ruth's motion for mistrial, the prosecutor several times improperly vouched for the credibility of Eden and Custer.

Specifically, the prosecutor stated, "You saw [Custer and Eden's] . . . demeanor on the stand. Do they look like murderous thugs? Did they sound like murderous thugs? Did they act like dealers of pounds and pounds and pounds of drugs? No." RP2 294. Later, the prosecutor contended, "Jeremy Custer and Drew Eden are fair and impartial normal young men in this day and age. They might smoke a little pot. They are into music. But they are basically good kids. I think you probably would be able to tell that from their testimony." RP2 301. The prosecutor also remarked, "[Ruth's] word is he saw them armed. They both testified that they don't own firearms. They don't look like guys that pack heat to you, do they?" RP2 311.

The prosecutor's remarks could have served no purpose other than to convey to jurors he found Custer and Eden truthful and they should, too.

As stressed above, this case hinged on whether the jurors would believe these two state witnesses or Ruth. And jurors had several reasons to doubt the credibility of Custer and Eden. Custer's reaction to the presence of police in front of his house was not that of a person who claimed to have just been shot while unarmed and for no reason. Eden testified he heard a rumor about a pound of marijuana at Custer's residence and stated the shooting was over a pound of marijuana. This evidence bolstered Ruth's testimony that Custer and Eden were violent, big-time drug dealers who stormed into his trailer to find his missing drugs and to attack him and Woerner for "snitching on [Custer]." RP2 242-43. Third, Eden's admission he may have heard Ruth shout, "Get the hell out of my trailer," RP1 174, contradicted his and Custer's version of events inside the trailer and supported Ruth's testimony that he was about to be attacked. So did Eden's testimony that what he heard coming out of Ruth's trailer sounded confrontational and that he went to the trailer thinking he might have to break up a fight. RP1 173.

Considering this testimony and other instances of misconduct, the prosecutor's vouching was flagrant and ill intentioned. The repeated comments compounded the prejudice such that they could not have been

remedied by curative instructions. Ruth's constitutional rights to due process and a fair trial were violated, and this court should reverse.

3. THE PROSECUTOR VIOLATED RUTH'S RIGHT TO REMAIN SILENT WHEN HE COMMENTED ON HIS PREARREST SILENCE DURING CROSS EXAMINATION AND CLOSING ARGUMENT.

The prosecutor improperly commented on Ruth's constitutional right to remain silent. First, Ruth testified that when he first began to go to Custer's apartment, he observed "pounds and pounds and pounds of different drugs." RP2 233-34. He also said Custer and his friends were constantly armed and talked openly about robbing people for drugs and killing people. RP2 235. On cross examination, the prosecutor asked him why he did not call the police when he learned of these things. RP2 263, 266. The question drew no objection, and Ruth responded that he feared telling the police because the group knew where his family and girlfriend lived. RP2 266.

Second, in closing argument the prosecutor repeated this theme, contending that despite seeing large quantities of drugs and hearing about murders, "[Ruth] doesn't call the police. Then, why doesn't he call the police. Because none of that is true." RP2 294. Later, in a different context, the prosecutor argued that instead of shooting Eden and Custer in the trailer he could have simply fled and "[c]all[ed] the cops." RP2 311. The prosecutor then argued, "He didn't have to pull out a gun. The bottom line

is, he didn't have to because he wasn't threatened. There were options, in other words." RP2 312.

The Fifth Amendment to the United States Constitution provides that no person "shall not be compelled in any criminal case to be a witness against himself." State v. Saavedra, 128 Wn. App. 708, 116 P.3d 1076, 1079 (2005). Wash. Const. article 1, § 9 states, "[n]o person shall be compelled in any criminal case to give evidence against himself." The protection of article 1, § 9 is coextensive with that of the Fifth Amendment. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

It is well-established that references to a defendant's post-arrest silence as indicative of guilt violate due process on the common-sense basis that, once a suspect is arrested and told he has the right to remain silent, it is fundamentally unfair to then use his exercise of that right against him. Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976); see also Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). "Such silence is 'insolubly ambiguous' because the defendant may be exercising the right to silence." State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996), quoting Doyle, 426 U.S. at 617.

It is now established law in Washington that the state violates the Fifth Amendment guarantee when it invites attention to a defendant's pre-arrest silence as well. Easter, 130 Wn.2d 241; see also State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996)(prearrest silence may not be used in state's case-in-chief as substantive evidence of defendant's guilt). As the Easter court reasoned, "If silence after arrest is 'insolubly ambiguous' according to the Doyle court, it is equally so before an arrest." Easter, 130 Wn.2d at 239 (emphasis in original).

Easter was a case in which the defendant did not take the stand. The Court in Easter noted that some other cases have suggested that a defendant's silence may be used for "the limited purpose of impeachment after the defendant has taken the stand." Easter, 130 Wn.2d at 237; see also State v. Carnahan __ Wn. App. __, 122 P.3d 187, 191 (2005), citing Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980) (permissible to impeach testifying defendant's claim of self-defense by referring to defendant's prearrest silence in not reporting a stabbing for two weeks).

In this case, the state used Ruth's prearrest silence against him when he testified and during closing argument. Generally speaking, such use is permissible for impeachment only. Jenkins, 447 U.S. at 231, 238-40

(permissible to use defendant's prearrest silence as impeachment and during argument where defendant took stand and asserted self-defense defense).

However, a prosecutor goes beyond mere impeachment and violates the defendant's right to silence where he makes a statement suggesting that silence should imply guilt, or that the defendant had an affirmative obligation to come forward with an explanation. Lewis, 130 Wn.2d at 706-07; State v. Heller, 58 Wn. App. 414, 419-421, 793 P.2d 461 (1990), citing State v. Apostle, 8 Conn.App. 216, 512 A.2d 947 (1986). An impermissible comment on a defendant's silence "occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, 130 Wn.2d at 707; see also State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002)(constitutional error for the state to exploit defendant's silence in closing argument); Heller, 58 Wn. App. at 420-21 (prosecutor's cross examination of defendant as to why she did not return to police or to prosecutor to correct story she originally gave to arresting officers that was inconsistent with her trial testimony was impermissible because it suggested to jury that subsequent silence could be interpreted as implying guilt or as comment on right to remain silent.).

In Ruth's case, the prosecutor's conduct crossed the line between proper impeachment and use of prearrest silence as substantive evidence of guilt. This was especially true of the prosecutor's closing argument, where he not only commented on Ruth's failure to call police, but followed up by stating that Ruth had options other than shooting Eden and Custer, i.e., that he did not act in self-defense and was thus guilty. The prosecutor therefore violated Ruth's constitutional right to remain silent.

Ruth's counsel did not object to the prosecutor's cross examination, and his objection to the prosecutor's closing remark was limited to its potential for misleading the jury with respect to the "no duty to retreat" instruction. RP2 311. Ruth may nevertheless challenge the prosecutor's remarks for the first time on appeal because they involve manifest constitutional error. Carnahan, 122 P.3d at 192; Heller, 58 Wn. App. at 417, n.1, citing State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). Because the state exploited Ruth's prearrest silence to infer guilt in an attempt to prejudice the defense, the constitutional harmless error standard applies. Romero, 113 Wn. App. at 791. The state thus bears the burden of proving beyond a reasonable doubt that any reasonable jury would have reached the same result without the error, and where the remaining evidence is so overwhelming it necessarily leads to a guilty finding.

Easter, 130 Wn.2d at 242, citing State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995), State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

In determining whether the untainted evidence is overwhelming, the court looks to whether the defendant's credibility was at issue because he testified as to disputed matters and to whether his exculpatory testimony was plausible. Heller, 58 Wn. App. at 421, citing, State v. Gutierrez, 50 Wn. App. 583, 590-91, 749 P.2d 213 (1988). This court is Heller reversed the conviction, finding the prosecutor's misconduct was not harmless because the defendant's credibility was in issue and because her testimony was "reasonably plausible and not facially unbelievable." Heller, 58 Wn. App. at 422.

The same is true here. Ruth testified to disputed matters and his version of events was reasonably plausible, especially when considering Custer's questionable conduct upon seeing police and Eden's testimony about marijuana and the role it played in this incident, the confrontational tone of Custer's and Ruth's argument, and an acknowledgement he may have heard Ruth demand Custer leave his trailer. The state therefore cannot satisfy its heavy burden to show the constitutional error was harmless. Without the state's improper use of Ruth's prearrest silence, it

cannot be convincingly concluded that any reasonable juror would have reached the same result. Ruth's right to remain silent was violated, and this court could should therefore reverse Ruth's convictions and remand for retrial.

4. RUTH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY PROPOSED A FAULTY SELF-DEFENSE INSTRUCTION.

Evidence of self-defense negates criminal intent. Accordingly, when faced with such a claim, due process requires the State to prove the absence of reasonable defensive force beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 489-96, 656 P.2d 1064 (1983).

Ruth's attorney requested a faulty instruction that eased the State's burden to disprove he acted in lawful self-defense when he fired at Eden and Custer inside his residence.

As noted above, instruction 17 required the State to prove beyond a reasonable doubt that Ruth did not reasonably believe Custer or Eden intended to inflict "injury" to him. CP 73. This is a correct statement of the law and formed the foundation of Ruth's trial defense.

Unfortunately, instruction 16 (the "act on appearances" instruction) employed a very different term -- "great bodily harm." CP 72. There is a large distinction. The definition of "injury" is common knowledge. "Great

bodily harm,” however, requires a much greater showing; it is “injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of the function of any bodily part or organ.” CP 65 (instruction 9); RCW 9A.04.110(4)(c); see also Rodriguez, 121 Wn. App. at 185-86; State v. Freeburg, 105 Wn. App. 492, 504, 20 P.3d 984 (2001).

Seven years before Ruth’s trial -- in State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), the Washington Supreme Court made it clear that the “act on appearances” instruction should not use the term “great bodily harm” even though it is found in WPIC 17.04 of the pattern instructions. Walden, 131 Wn.2d at 475 n.3; see also Freeburg, 105 Wn. App. at 507 (calling it “imperative” that trial courts use the correct language).

Rodriguez is on all fours with Ruth’s case. There the defendant was convicted of first degree assault with a deadly weapon. Rodriguez, 121 Wn. App. at 183. Counsel likewise proposed the same faulty “act on appearances” instruction, and the trial court defined “great bodily harm” using the same language as that used here. Rodriguez, 121 Wn. App. at 185-86. The court identified the precise problem raised here:

Based on the definition of ‘great bodily harm,’ the jury could easily (indeed may have been required to) find that in order to act in self-defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent

disfigurement, or loss of a body part or function.” And this is precisely the problem the Supreme Court warned against in State v. Walden.

Rodriguez, 121 Wn. App. at 186.

Given Walden, Rodriguez, and Freeburg, it is difficult to fathom how the court, the prosecution, and defense counsel failed to recognize the error in instruction 16. By requesting, rather than objecting to, instruction 16, defense counsel denied Ruth his constitutional right to effective representation and a fair trial.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984)), cert. denied, 510 U.S. 944 (1993)(emphasis in original). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978); Strickland, 466 U.S. at 690-91. Proposing a detrimental instruction,

even when it is a WPIC, may constitute ineffective assistance of counsel. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)(counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

There is simply no excuse for counsel's failure to object to use of "great bodily harm" in light of Walden, Rodriguez, and Freeburg. His failure to investigate the law falls below what can be considered reasonable and competent. Additionally, there can be no tactical reason to propose the instruction, since "the net effect was to decrease the State's burden to disprove self-defense." Rodriguez, 121 Wn. App. at 187.

Further, Ruth was prejudiced because there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

"Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard 'manifestly apparent to the average juror.'" LeFaber, 128 Wn.2d at 900 (quoting Allery, 101 Wn.2d at 595).

For each count, Ruth was legally entitled to defend himself based merely on his reasonable fear of “injury.” But under instruction 16, jurors could not find for Ruth on this claim unless it concluded that he reasonably feared “great bodily harm,” meaning “injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that creates significant permanent loss or impairment of the function of any bodily part or organ.” CP 65. This is an inaccurate statement of the law that improperly raised the bar for lawful self-defense – Ruth’s only defense at trial.

The faulty instruction “struck at the heart of” Ruth’s defense. Rodriguez, 121 Wn. App. at 187. In Rodriguez, the court found counsel’s deficient performance prejudicial because “[a]s instructed the jury was required to find that he was scared of death or at least permanent injury. And this not the test.” Rodriguez, 121 Wn. App. at 187.

By proposing, rather than objecting to, instruction 16, defense counsel deprived Ruth of his right to effective representation, due process, and a fair trial. This court should reverse.

5. CUMULATIVE ERROR DEPRIVED RUTH OF HIS
RIGHT TO A FAIR TRIAL.

Ruth contends that any of the trial errors set forth above require reversal and a new trial. If this court disagrees, the cumulative effect of

errors will require reversal where that effect deprives a party of his right to a fair trial. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997).

Cumulative error denied Ruth his right to a fair trial. Ruth suffered prejudice from the prosecutor's improper admission of an alleged inconsistent statement by innuendo through unperfected cross examination. He was further prejudiced when the prosecutor improperly offered an opinion against Ruth's credibility, misstated the law of self-defense, and vouched for the credibility of key witnesses Custer and Eden. Ruth was also prejudiced because the prosecutor improperly impeached him for exercising his right to remain silent. Finally, Ruth's counsel was ineffective for proposing an erroneous self-defense instruction that reduced the state's burden of disproving self-defense beyond a reasonable doubt. The cumulative effective of these errors deprived Ruth of his constitutional right to a fair trial.

6. THE TRIAL COURT VIOLATED RUTH'S CONSTITUTIONAL RIGHT TO A JURY TRIAL BY IMPOSING 60-MONTH "FIREARM" ENHANCEMENTS BECAUSE IN THEIR SPECIAL VERDICTS, JURORS FOUND ONLY THAT RUTH WAS ARMED WITH A "DEADLY WEAPON."

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004)(quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)). The "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis in original).

At sentencing in Ruth's case, counsel contended that under Blakely, the trial court was bound by the jury's special verdict finding that Ruth used a deadly weapon, not a firearm. RP3 11. Counsel was correct.

This case is controlled by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), cert. granted, 126 S. Ct. 478 (2005). There the defendant was charged with second degree assault with a deadly weapon enhancement because he assaulted his wife while holding a gun. Recuenco, 154 Wn.2d at 158-59. The jury convicted the defendant as charged. Recuenco, 154 Wn.2d at 160. However, the jury was given a special verdict form asking them to find whether the defendant was armed with a deadly weapon – not a firearm -- during the commission of the

crime. Recuenco, 154 Wn.2d at 159. The jury answered in the affirmative. Recuenco, 154 Wn.2d at 160. Nevertheless, the trial court imposed a firearms sentencing enhancement. Recuenco, 154 Wn.2d at 160.

Our supreme court held that the Blakely/Apprendi rule applies to weapons enhancement findings. Recuenco, 154 Wn.2d at 162-63. Because the jury found only the use of a deadly weapon, the court's imposition of a firearm sentence enhancement thus violated the defendant's constitutional right to a jury trial. Recuenco, 154 Wn.2d at 162-63.

Second, citing State v. Hughes, 154 Wn.2d 118, 148, 110 P.3d 192 (2005), the court held that Blakely Sixth Amendment right to jury trial violations "can never be deemed harmless because to do so would be to speculate on the absence of jury findings." Recuenco, 154 Wn.2d at 164. The court vacated the defendant's sentence and remanded for resentencing based solely on the deadly weapon enhancement that is supported by the jury's special verdict. Recuenco, 154 Wn.2d at 164.

The same result must obtain here.

D. CONCLUSION

Appellant Mathew Ruth was prejudiced by several distinct types of prosecutorial misconduct discussed in detail above. In addition, Ruth's trial counsel was ineffective for proposing an incorrect self-defense instruction that reduced the state's burden. These errors, alone or cumulatively, require a reversal of Ruth's convictions and a new trial. Finally, the trial court imposed a firearms deadly weapons enhancement in violation of Ruth's right to a jury trial. For this reason his sentence should be vacated and remanded for resentencing.

DATED this _____ day of December, 2005.

Respectfully submitted,

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